

# CITY OF SCOTTSDALE PERSONNEL BOARD Regular Meeting

**Tuesday, June 12, 2012** 

## HUMAN RESOURCES PINNACLE TRAINING ROOM 7575 E. MAIN STREET

**PRESENT:** June Cohen, Chairperson

Lyle Ferger, Vice Chair

John Tutelman

**STAFF:** Valerie Wegner

Bernadette La Mazza

Jennifer Pollock - legal advisor

GUESTS: Sue Santee

#### CALL TO ORDER

Chair Cohen called the Personnel Board regular meeting to order at 3:00 p.m. Roll call confirmed the presence of Board members as noted above.

# 1. APPROVAL OF MINUTES OF PUBLIC MEETING CONDUCTED ON APRIL 19, 2010

In response to Board Member Ferger's question regarding content contained in the minutes, Ms. Wegner explained the composition and function of the Employee Relations Committee.

BOARD MEMBER TUTELMAN MOVED TO APPROVE THE MINUTES OF THE MEETING OF APRIL 19, 2010. SECONDED BY BOARD MEMBER FERGER, THE MOTION CARRIED UNANIMOUSLY WITH A VOTE OF THREE (3) TO ZERO (0).

# 2. APPROVAL OF MINUTES OF PUBLIC MEETING CONDUCTED ON DECEMBER 14, 2010

Referring to the adoption of findings of fact and conclusions of law, Board Member Tutelman inquired if it is typical that these are not spelled out in the meeting minutes. Ms. Wegner confirmed that it is. The final decision rests with the City Manager, who receives a verbatim transcript of the entire hearing.

BOARD MEMBER TUTELMAN MOVED TO APPROVE THE MINUTES OF THE MEETING OF DECEMBER 14, 2010. SECONDED BY BOARD MEMBER FERGER, THE MOTION CARRIED UNANIMOUSLY WITH A VOTE OF THREE (3) TO ZERO (0).

#### 3. APPROVAL OF 2010 PERSONNEL BOARD ANNUAL REPORT

BOARD MEMBER TUTELMAN MOVED TO APPROVE THE 2010 ANNUAL REPORT OF THE PERSONNEL BOARD. SECONDED BY BOARD MEMBER FERGER, THE MOTION CARRIED UNANIMOUSLY WITH A VOTE OF THREE (3) TO ZERO (0).

#### 4. APPROVAL OF 2011 PERSONNEL BOARD ANNUAL REPORT

BOARD MEMBER TUTELMAN MOVED TO APPROVE THE 2011 ANNUAL REPORT OF THE PERSONNEL BOARD. SECONDED BY BOARD MEMBER FERGER, THE MOTION CARRIED UNANIMOUSLY WITH A VOTE OF THREE (3) TO ZERO (0).

#### 5. ETHICS TRAINING

Ms. Jennifer Pollock of the City Attorney's Office presented the annual ethics training video, and staff collected the acknowledgement forms completed by the Board Members.

## 6. ELECTION OF CHAIR AND VICE-CHAIR

BOARD MEMBER TUTELMAN NOMINATED CHAIR COHEN AND VICE-CHAIR FERGER FOR ANOTHER TERM. VICE-CHAIR FERGER SECONDED THE NOMINATION, WHICH CARRIED BY A UNANIMOUS VOTE OF THREE (3) TO ZERO (0).

# 7. DISCUSSION AND APPROVAL OF PERSONNEL BOARD RULES AND PROCEDURES

Ms. Bernadette La Mazza presented the proposed changes to the Personnel Board Rules that she had drafted, which are intended to formalize practices which the Board may have followed in the past although they were not enshrined in the formal rules.

It is proposed that if an employee (appellant) does not have legal representation, the hearing is put on by the head of that employee's department. In cases where an employee is represented by an attorney, the hearing is put on by the attorney representing the City from the City Attorney's Office.

Chair Cohen said she understands the motion, but expressed concern that the appellant employee would be confronting their department head. This could be more intimidating than appearing before someone from the City Attorney's Office.

Ms. La Mazza said staff received feedback concerning the last case heard by the Board. Other employees said that facing an attorney is more intimidating and felt this would be disempowering.

Board Member Tutelman said this is an adversarial proceeding. He was uncomfortable with the City altering its approach when an appellant chooses not to hire an attorney.

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Ms. La Mazza cited a case she had been privy to where the City Attorney's Office worked with the department head to prepare for the hearing.

Ms. Cohen suggested that having the City Attorney's Office prepare a department head is a bit of a sham, since they have the benefit of legal counsel. She clarified that the proposal is for the department head to represent the City in cases where the appellant has not retained legal counsel.

Ms. La Mazza reported that before the last hearing, she received feedback from employees stating that they found it unfair that they would have to face a City Attorney to present their appeal case instead of their department head; which not only was intimidating but inequitable – so there was no point in holding a hearing. After the hearing, Ms. La Mazza received additional feedback from employees who stated that they did not have the skill level to compete against an attorney and felt as though they would be unable to represent themselves effectively if they were in a similar situation.

Chair Cohen suggested that the appellant should be advised that the City may use either the City Attorney's Office or the appellant's department head to represent the City, regardless of whether the appellant hires an attorney. Her second suggestion was to make sure that the appellant has an attorney. She believes there should be an avenue of appeal that the employee sees as fair, equitable and unbiased. However, the procedures lay a heavy burden on the employee. Although this suggestion would be difficult, if the City really wants an even playing field the employee should have access to attorney services.

Board Member Tutelman stated that there are only two ways to implement that suggestion, neither of which is very palatable. One would be to have the City Attorney's Office somehow assist the appellant. That is not feasible. The other is to provide them with private counsel, a costly endeavor. He pointed out that the Personnel Board provides recommendations to the City Manager and does not make the ultimate decision.

Chair Cohen suggested that allowing the appellant who does not retain counsel to choose whether the City would be represented by the City Attorney's Office or the appellant's department head would eliminate some of the inequity issues. Ms. La Mazza repeated that employees' perception is that one cannot win against an attorney.

Vice-Chair Ferger commented that after the hearing the appellant may well be back at work for their department head. He has observed that appellants are at a distinct disadvantage and many cannot present their case well.

Ms. La Mazza said over the past ten (10) years she has seen department heads with different presentation skills and received the most feedback on the hearing where the attorney presented the case, not the department head.

Vice-Chair Ferger said he is not sure that if the appellant is facing his or her department head the playing field can ever be level.

Chair Cohen recalled a case the Board had heard where the appellant and their department head were already in conflict and the hearing process exacerbated the situation. She believes that the primary objective of the Personnel Board is to ensure

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that the employee has an unbiased avenue of appeal, independent of City management. She asked how other cities handle this kind of situation.

Ms. La Mazza said either the department head puts on the case or if the head is very involved in the case, a designee is appointed. Some cities have attorneys put on their cases; however, this seems to be more common when the employee retains legal counsel. She added that in many cities, the employees are unionized and therefore have access to counsel.

Saying that the principles of fairness and independence are really important to her, Chair Cohen suggested the City could guarantee to pay up to \$500 towards legal and copying costs if the appellant completes the appeal process. She pointed out that in the last two years, the Board has only heard two (2) cases. She believes it is important to show that the independent review process is robust and effective.

Ms. Wegner said this decision cannot be determined at this point without further consultation and consideration of budgetary impacts.

Vice Chair Ferger asked why Human Resources does not present the case. This would avoid the involvement of any attorneys.

Ms. La Mazza noted that the HR Analyst works in conjunction with the City Attorney's Office and the department, therefore presenting the case would be problematic.

Chair Cohen said that employee relations are a line management responsibility. Employee relations are responsible for providing the counseling and training to the line manager. She would be more comfortable with the proposal than with HR presenting the City's case.

Vice Chair Ferger said he was trying to eliminate attorneys from the process.

In response to a question by Chair Cohen, Board Member Tutelman said he does not have a problem with the proposed change as it is currently written. His one qualm is that one side, the City, is being forced to tie one arm behind their back. He agreed that this makes the process less intimidating.

Vice Chair Ferger said he could go along with this proposal. The employee may not feel so intimidated, as he/she would not be dealing with an attorney.

Chair Cohen asked the Board Members how they felt about her first suggestion, to allow the appellant to choose whether the City will be represented by someone from the City Attorney's Office or his own department head.

Board Member Tutelman said if there is friction between the employee and the department head, this is a good option. Vice Chair Ferger agreed.

Chair Cohen said the Personnel Board cannot let department heads decide whether to present their case or not. Board Member Tutelman asked her why not. She replied that employee relations are a line management responsibility and suggested that department heads could designate a colleague to represent the department. Vice-Chair Ferger said cutting the word "attorney" from the procedures would achieve a lot. Board Member Tutelman said insisting that the department head present the department's case takes away needed flexibility.

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Ms. La Mazza said if the issue is particularly between the employee and the department head, she would alert the Personnel Board that she recommended using a designee in the case.

Chair Cohen said she is trying to avoid the employee feeling as if the rules are on the City's side. Vice Chair Ferger recalled being taken aback in the Johnson case that the City's case was presented by the City Attorney's Office.

Board Member Tutelman said to an extent, the Board is at a loss as to how much control they want to exercise when an appellant is unrepresented. No rule covers that situation, which may not be a bad thing. His thoughts are that where the appellant is represented by an attorney, the City Attorney may represent the City. Where an appellant is unrepresented, the City Attorney shall not represent the City except with the consent of the Board. This leaves open the question of who would represent the City if not someone from the City Attorney's Office.

Chair Cohen said she is concerned about consistency between departments. Board Member Tutelman said it may not be possible to create a rule that takes individual differences into account.

Chair Cohen replied that the Board should be able to make rules that the appellant feels are fair. She asked whether the appellant can be represented by someone other than themselves or an attorney. Ms. La Mazza said they cannot. Chair Cohen asked why this is, suggesting it is time to change the rules.

Vice-Chair Ferger inquired whether staff has ever researched why appellants drop their case before their hearing. Citing his professional experience with the City of Phoenix, Board Member Tutelman said police officers often wait to see whether AZ POST decertifies them before proceeding. Ms. La Mazza discussed one case of an officer whose case was also before the Public Safety Personnel Retirement System (PSPRS) Police Board. Chair Cohen recalled that one appellant had retired.

Board Member Tutelman suggested the following language:

"Where an appellant is represented by counsel, the City Attorney may represent the City. Where an appellant is unrepresented, the City Attorney shall not represent the City, except with the consent of the Board."

Vice Chair Ferger suggested it would be preferable not to use the City Attorney. Ms. La Mazza recalled one case where the City Attorney was needed to represent the City because of the appellant's background.

Chair Cohen suggested that the executive director of the department in question should represent the City and any exceptions to that would be by the consent of the Personnel Board.

Ms. Wegner said if the Board wishes to allow exceptions by consent of the Board, a public meeting would have to be convened for the Board Members to formally give their consent.

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Board Member Tutelman said they could add a rule that appellants must notify the City ahead of time whether they plan to be represented. Chair Cohen said that as Chair she grants exceptions. Board Member Tutelman agreed that the language he proposed could be altered to:

"Where an appellant is represented by counsel, the City Attorney may represent the City. Where an appellant is unrepresented, the City shall be represented by the executive director, except by the consent of the Chair."

Chair Cohen pointed out that this gives the City choices which the appellant does not have. The appellant does not have the option to have someone else present his or her case. Ms. La Mazza said they can retain an attorney. Chair Cohen said an appellant may have a family member who would be able to present their case. Vice Chair Ferger said appellants may not have the money to hire a lawyer.

Ms. Pollock said it is a question of due process and appeal rights. In this kind of administrative process the employee does not have a right to have an attorney appointed by the City to represent the employee, which is why the City would not be providing that. It depends who can represent an individual. If this constitutes the unauthorized practice of law, that could create some issues. Staff would have to investigate this question. The employee has a right to a hearing and may be represented by counsel in order to present their case.

Board Member Tutelman said the Board wants to give appellants the right to be represented as they best see fit, if this is possible. He requested staff investigate the options and report back to the Board.

BOARD MEMBER TUTELMAN MADE A MOTION THAT THE BOARD ADD TO RULE 2.1, REPRESENTATION BY COUNSEL, THAT WHERE THE APPELLANT IS REPRESENTED BY AN ATTORNEY, THE CITY ATTORNEY MAY REPRESENT THE CITY. WHERE APPELLANT IS UNREPRESENTED BY AN ATTORNEY, THE DEPARTMENT'S EXECUTIVE DIRECTOR SHALL REPRESENT THE CITY, EXCEPT WITH THE CONSENT OF THE CHAIR OF THE PERSONNEL BOARD. VICE-CHAIR FERGER SECONDED THE MOTION, WHICH CARRIED BY A UNANIMOUS VOTE OF THREE (3) TO ZERO (0).

Ms. La Mazza turned to proposed changes to Rule 2.2 about providing four (4) sets of witness lists and exhibits prior to the hearing not less than ten (10) working days before the hearing. She acknowledged that on occasion HR staff members have made extra copies in order to have enough full sets for the Board Members and staff who support the Personnel Board hearing process. The proposed change is to make the deadline fifteen (15) working days before the scheduled hearing, and that parties must provide six (6) sets of copies so that staff does not need to do any copying.

Chair Cohen recalled one case where the City was late providing copies. She directed that the rules should be very clear on the definition of working days, especially when it comes to holidays.

VICE CHAIR FERGER MADE A MOTION TO ACCEPT THE PROPOSED CHANGES TO RULE 2.2. BOARD MEMBER TUTELMAN SECONDED THE MOTION, WHICH CARRIED BY A UNANIMOUS VOTE OF THREE (3) TO ZERO (0).

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Ms. La Mazza stated that the third proposal is to add language regarding contacting other parties' witnesses. The practice has been that parties cannot speak to witnesses called by the opposing party until the day of the hearing; however that is not currently enshrined in the rules. At the last hearing the City did, in fact, contact the appellant's witnesses, although Ms. La Mazza said she was unaware of this until the day of the hearing. Staff is requesting that this practice be formalized.

Chair Cohen commented that this may be why employees felt the playing field was not level. Although employees are directed to comply with the process, the City Attorney's staff was not complying.

Board Member Tutelman said there are two diametrically opposed options. One is to say that both sides should have as much information as possible before the hearing to allow them to prepare. In a court case, this is discovery. The other option is that the respective parties only speak with their own witnesses. If the Board is concerned with leveling the playing field, then the appellant must be advised of his right to talk to the City's witnesses. In contentious cases this can be problematic.

Ms. La Mazza said employees perceive that they must comply with requests from senior City management. However they may feel they do not need to comply with requests from the appellant.

In response to a question by Chair Cohen, Ms. La Mazza confirmed that staff has sometimes delivered subpoenas to witnesses, requiring their attendance. No one has ever failed to show up.

Ms Wegner recalled a case where the appellant was having a very difficult time getting current employees to testify as witnesses on his behalf. At the time nothing in the rules said that employees must attend the hearing if called as a witness. The rules were subsequently changed.

Chair Cohen said the issue at hand is whether the parties can contact each other's witnesses before the hearing.

Ms. Wegner said prior to the last hearing it was her understanding that there was no contact prior to the hearing. Ms. La Mazza interjected that staff told the parties that, but it is not written in the rules. Ms. Wegner then stated that the City Attorney's Office staff who contacted the other party's witnesses believed it was permissible to do so since there is no written rule.

Ms. LaMazza summarized that the staff proposal is that questioning of opposing witnesses be reserved until the hearing. That way everyone will hear the same questions and answers.

Board Member Tutelman said in disciplinary cases the City is both investigating and prosecuting and the question is how to draw the line. This could be difficult for the City Attorney.

Chair Cohen said people become witnesses when the parties submit their witness lists. Staff agreed with her that an employee might in fact be on both witness lists. Chair Cohen stated that this should be spelled out in the rules to avoid confusion.

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CHAIR COHEN MADE A MOTION TO ADD TO THE PERSONNEL BOARD RULES THAT ONCE AN EMPLOYEE IS DESIGNATED ON EITHER THE APPELLANT'S OR THE CITY'S WITNESS LIST, THEN NEITHER PARTY MAY CONTACT OPPOSING WITNESSES TO QUESTION THEM PRIOR TO THE PERSONNEL BOARD HEARING AND THAT ANY QUESTIONING OF THE OPPOSING PARTY'S WITNESSES BE CONDUCTED ONLY DURING THE PERSONNEL BOARD HEARING, EXCEPT WITH THE CONSENT OF THE OPPOSING PARTY. BOARD MEMBER TUTELMAN SECONDED THE MOTION.

Chair Cohen said the Board needs to know whether either party has violated any of the rules prior to the hearing. She recalled a case where the City was very late with the witness list and exhibits. It was clear that the appellant was unhappy. At that particular hearing she denied several pieces of evidence.

Ms. Wegner announced that staff has received an appeal which is scheduled for August 14. When they contact the appellant they provide a copy of the rules and procedures. Based on today's decisions, the new rules will not apply to this hearing since it is already in process.

Vice Chair Ferger commented that the appellant has to wait a long time. Ms. Wegner said everyone has the right to request one continuance as a matter of right and then future continuances may be granted with the Chair's approval. Board Members recalled continuances requested by both the City and appellants.

Chair Cohen called for the vote for the motion she presented.

## THE MOTION CARRIED BY A UNANIMOUS VOTE OF THREE (3) TO ZERO (0).

Chair Cohen asked what happens if a meeting takes place with just two Board Members and the vote is split. Ms. Pollock explained that this means there is no decision and the information is relayed to the City Manager. Saying that she prefers not to hold meetings with only two members in attendance, Chair Cohen asked the other Board Members for their thoughts.

Ms. Pollock said the City Manager would be able to review the verbatim transcript. She pointed out that in the case of a conflict of interest of a board member who has to recuse himself/herself, the Personnel Board might have to hold a hearing with just two members in attendance.

Ms. La Mazza said after every Personnel Board hearing she meets in person with the City Manager and provides a statement, the transcript, and marks the most significant parts of the hearing. She brings her own notes from the meeting and presents a factual review of the hearing and the outcome.

Chair Cohen said if there is a tie, really the appellant will feel as if they lost their appeal. Ms. La Mazza recalled a case where the Board's disciplinary recommendation was less than the City was requesting, and the City Manager reviewed the case carefully and upheld the recommendation of the Personnel Board.

Board Member Tutelman noted that tied votes can occur in any board if one member is unable to participate for any reason.

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Chair Cohen reiterated that she prefers that they work hard to schedule hearings when all three members can attend, to be fair to appellants. She stated that if there is ever a case where the City Manager does not follow the unanimous recommendation of the Board, it would be time to go talk to the Mayor.

## 8. MOTION TO RECESS INTO EXECUTIVE SESSION

The Board did not recess into executive session.

#### 9. **FUTURE AGENDA ITEMS**

Board Member Tutelman reviewed with Ms. La Mazza the information he had requested.

Chair Cohen directed staff to advise her when hearing materials are ready as it simpler for her to pick it up than to have it delivered.

### **ADJOURNMENT**

With no further business to discuss, the regular meeting of the Personnel Board adjourned at 5:01 p.m.

Respectfully submitted, Bernadette La Mazza Human Resources Manager

Reviewed by, June Cohen Personnel Board Chair